

# Pro Se

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## State Law Barring Adoptions by Felons Found to be Unconstitutional

Social Services Law §378 bars people from qualifying as foster or adoptive parents if they have been convicted of a felony involving commission of a violent crime, child abuse or neglect, spousal abuse or child pornography. Earlier this year, Derrick Adamson [name changed by court to protect the privacy of the child and the petitioners] and his wife moved to adopt a 7 year old foster child who had been living with them since the child's birth in 2004. Mr. Adamson had been convicted of a violent felony in the early 1990s. Because of this law, his wife was the child's sole foster parent, and the law barred Mr. Adamson from adopting the child.

The Adamson's petition to adopt the child who had lived with them for seven years was supported by the Department of Social Services and by a report made by the social worker employed by the attorney for the child. New York Foundling home, the agency having custody of the child, also recommended that Mr. Adamson be permitted to adopt the child.

In Matter of Adoption of Abel A., 33 Misc.3d 710 (Fam. Ct. N.Y. Co. 2011), the statute at issue was SSL §378 a(2)(e). Prior to 2008, the court wrote, the court would have found that Mr. Adamson's 1992 robbery conviction did not automatically disqualify him from adopting the child because the denial of the petition to adopt would have created an unreasonable risk of harm to the child's mental health and granting the petition

would have been in the child's best interest and would not have put his safety in jeopardy. In 2008, however, in order to comply with the federal Adam Walsh Child Protection Act of 2006, see Public Law 109-248, New York State eliminated the language in SSL §378-a which would only have presumptively disqualified from becoming foster parents those who had been convicted of certain felonies, and by doing so made automatic the disqualification of those prospective foster or adoptive parents who had been convicted of certain felonies.

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# IT'S THAT TIME OF YEAR AGAIN

## *A Message From The Executive Director - Karen L. Murtagh*

As you all know, PLS was created after the 1971 Attica uprising, due to the concern that incarcerated individuals needed access to lawyers to help them air their grievances and handle civil matters associated with conditions of their confinement. For over 35 years PLS had provided high quality, effective legal representation and assistance to indigent prisoners, we have helped them to secure their civil and human rights and we have constantly advocated for more humane prisons and for a more humane criminal justice system.

As you also know, although PLS is funded by the State, every year we have to fight for our funding. It is that time of year again, when the Governor puts together his Executive Budget, the time of year when we need to send a loud and clear message to the Governor that PLS needs to be funded.

Last year, hundreds of our readers wrote letters to the Governor and to our Legislative leaders encouraging them to include funding for PLS in the State budget. Those letters paid off. Although we did not receive the full funding we requested, we were able to keep our doors open and to continue providing civil legal services in the most egregious cases. We responded to over 8000 requests for assistance. We successfully challenged numerous disciplinary hearings resulting in over 30 years of solitary confinement time being expunged from individuals' records and we obtained over 40 years of jail time and sentencing credit by successfully challenging illegally withheld jail time and improper sentence calculations. We advocated for the proper care, treatment and placement for individuals suffering with mental illness and we filed a number of excessive force cases seeking damages for the unnecessary and unlawful use of force against our clients. We also published *Pro Se* on a bi-monthly basis, providing crucial legal advice and information to thousands of prisoners across the State.

We need your help again. Please contact the Governor and our Legislative leaders and urge them to include funding for PLS in the 2012-2013 State budget. Tell the Governor and our Legislative leaders that funding for PLS is vital to public safety and public health and is a sound economic investment. Remind them that, in these tough economic times, it is critical that they show leadership on the issues that are important to the safety and economic stability of this State.

Below is a letter that you can use to help formulate your message to the Governor and our Legislative leaders.

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Dear

*I write to encourage you to include funding for Prisoners' Legal Services ("PLS") in the 2012-2013 State budget. Created in the wake of the Attica riot to provide prisoners with non-violent conflict resolution and meaningful access to the courts, for over 35 years PLS has fulfilled its purpose. And in this time of economic crisis, when everyone is being asked to tighten their belts, this is exactly the time to keep an organization like this around.*

*Why? Because by correcting jail time and sentencing errors, PLS saves the State millions of dollars every year and the amount PLS saves the State is directly proportional to the amount PLS receives in State funding. In 2008, PLS saved the State approximately \$4.1 million; in 2009, \$6.9 million; in 2010, \$5.3 million; and in 2011, \$3.4 million.*

*True, this past year PLS answered over 8,000 requests for assistance and its work has improved prison conditions and provided prisoners with a mechanism to peacefully air their grievances thus helping to prevent another costly prison uprising, but those cost savings are hard to measure. What is not hard to measure is the cost to the State when a person is held, sometimes years past his scheduled release date. We are not talking about letting prisoners out early as is being done in many other States; we are talking about making sure taxpayers are not paying to keep people in prison when they should be out.*

*With the budget shortfall facing this State, the 40<sup>th</sup> anniversary of Attica upon us, reported increases in prisoner suicides throughout the State and continued increases in prisoner complaints, now is not the time to discontinue funding a program that protects the public while saving the State millions of dollars!*

Send your letters to:

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Executive Chamber  
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Albany, NY 12224

Hon. Sheldon Silver, Assembly Speaker  
Albany Office  
LOB Room 932  
Albany, NY 12248

Hon. Dean Skelos, Senate Majority Leader  
Albany Office  
LOB, Room 909  
Albany, NY 12247

**Please: PASS THIS INFORMATION ON TO YOUR FAMILY MEMBERS, FRIENDS AND ANYONE WHO WILL LISTEN AND ARE WILLING TO ACT NOW TO ENSURE THAT PLS CAN CONTINUE TO PROVIDE LEGAL SERVICES TO PRISONERS.**

. . . .continued from page 1

The amended law provided, in pertinent part, that an application for certification for approval of a prospective adoptive parent *shall be denied* where a criminal history record of the prospective adoptive parent reveals a conviction for a crime involving violence. The court found that because Mr. Adamson fell within the group of convicted felons who were disqualified from adoption by virtue of having been convicted of a crime involving violence, that is, robbery in the third degree, he was not eligible to adopt.

Ordinarily, when a prospective adoptive parent has a conviction for a crime that merits disqualification from becoming an adoptive parent, the foster care agency must immediately remove the child from the home where that foster parent is residing. See SSL §278-a(2)(h). However, the court wrote, in this case it is beyond argument that Mr. Adamson had rehabilitated himself and that following the strict mandates of the law and removing the child from the only home that he has ever known, would have a devastating effect on the child. In addition, the court found, to remove the child from the Adamson's home would violate the due process rights of the Adamsons and of the child to an individualized determination of whether the adoption is in the child's best interest.

The right to a case specific determination in matters relating to the establishment or termination of parental rights was established forty years ago in Stanley v. Illinois, 605 U.S. 645 (1972). In Stanley, the United States Supreme Court struck down Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. The court held that after the death of the mother, unless there was a due process hearing to determine whether the fathers were fit to raise their children, removal of the children from the fathers violated their 14<sup>th</sup> Amendment rights to due process of law. In reaching this result, the Court wrote: "[P]rocedure by irrebuttable presumption is always cheaper and faster than individualized determination. But when the . . . procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to fast formalities, it needlessly risks

running roughshod over the important interests of both parent and child . . . [and] therefore cannot stand."

Finding that it could not ignore the realities of the Adamson family, the court held that SSL §§378-a(2)(e)(1) and 378-a(2)(h), as applied to the facts of their adoption petition, violated Mr. and Mrs. Adamson's and the child's right to a determination, based on the totality of the circumstances, as to whether the adoption of the child by the Adamsons is in the child's best interest. Finding that the adoption was in the child's best interest, the court granted the adoption petition.

## News and Briefs

### Penal Law "Expiration" Dates

Each week, PLS receives inquiries from prisoners asking about the expiration dates — usually on September 1 of the year in which the inquiry is made — of various sections of the Penal Law. These expiration dates are sometimes set forth in the notes section in McKinney's statutes and sometimes in the body of the law. These dates, so-called "Sunset Provisions" or "Sunset Clauses," were part of the Sentencing Reform Act and Jenna's Law. The laws, and in turn these sunset dates, have been extended every two years since the enactment of these acts, and likely will continue to be extended indefinitely. Among the statutes which have expiration dates is P.L. §70.00(6) which dictates that determinate sentences must be imposed for offenders sentenced pursuant to P.L. §§70.02 (violent felony offense), 70.04 (second violent felony offender) and 70.06 (second felony offender) and that such sentences must include a period of post release supervision. Penal Law §70.00(6) was recently extended through September 2013. Should a sentencing statute's sunset provision not be extended, we will certainly report on this in *Pro Se*. However, at this time there is no reason to think that these statutes will not have their sunset provisions extended or that the applicable Penal Law provisions will actually expire.

## STATE COURT DECISIONS

### Disciplinary

#### **The Line Between Self-Defense and Assault; Credibility Determinations**

The charges against the petitioner in Matter of O'Sullivan v. Fischer, 930 N.Y.S.2d 296 (3d Dep't 2011), arose from petitioner's involvement in a **physical altercation** (a fight) with another inmate. The petitioner was charged with assault, fighting, creating a disturbance and refusing a direct order. The facts alleged in the Misbehavior Report were that the petitioner fought with another inmate, ignored an officer's orders to stop, and bit off a piece of the other inmate's nose. The petitioner pled guilty to fighting and creating a disturbance and was found guilty of the other charges.

#### **Line Between Self Defense and Assault**

On appeal, the court noted that while the record indicated that the other inmate started the fight and petitioner testified that his involvement was strictly in self defense, the hearing officer was entitled to credit evidence that petitioner's conduct **exceeded** (went beyond) what was necessary to protect himself. Based on this view, the court agreed that the determination of guilt with respect to the charge of assault was supported by substantial evidence.

#### **Judicial Review of Credibility Determinations**

In addition, the court noted that it was the hearing officer's role to **determine the credibility of petitioner's testimony** (decide whether what the petitioner said was believable) that he did not hear the officer's order to stop fighting hearing. In O'Sullivan, the hearing officer did not credit the petitioner's testimony that he did not hear the officer's order to stop fighting. Apparently based on the circumstances, the hearing officer did not find the testimony to be believable, and found the petitioner guilty of refusing a direct order. Long established principles of judicial review of

administrative hearings prohibit a court from reviewing the credibility determinations made at administrative hearings.

***Practice Point:** Tier III hearings can be successfully challenged where the determination of guilt is not supported by substantial evidence or where the hearing officer's conduct of the hearing violated one or more of the inmate's rights to due process of law. That the hearing officer chose to credit the testimony of one witness over that of another, or chose to reject testimony that was given by one witness will rarely be the basis for a successful challenge of a Tier III hearing. This is because the courts have consistently held that the reviewing court must defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses. See, for example, Matter of Berenhaus v. Ward, 522 N.Y.S.2d 478 (1987). The courts take the position that it is improper to review hearing officer credibility determinations because the review by the courts is confined to the printed record while the administrative hearing officers had the advantage of watching and listening to the witnesses testify.*

#### **Court Reverses Tier III Due To HO's Violation of Inmate's Right to Call Witnesses**

In Matter of Edwards v. Fischer, 930 N.Y.S.2d 358 (4<sup>th</sup> Dep't 2011), in an unusual sequence of events, the petitioner, who had initially denied the charges against him, pled guilty after the hearing officer refused to call petitioner's witness. Petitioner was found guilty of drug possession, and smuggling. In this Article 78 proceeding, the petitioner argued that the charge of drug possession should be reversed because of the hearing officer's wrongful denial of the petitioner's request for witnesses. Normally, the court would have found that the petitioner's plea of guilty was a waiver of his due process rights. However, in this case, where it appears that it was the hearing officer's denial of the petitioner's request that a particular employee be called as a witness that caused petitioner to plead guilty, the court concluded that the petitioner's plea did not constitute a waiver of his rights and that those rights had been violated by the hearing officer's denial of his request for a witness.

## **Denial of Request for Directive on Contraband Searches Leads to Hearing Annulment**

A hearing officer's denial of an inmate's request for a copy of DOCCS Directive No. 4910, which covers searches for contraband, caused the Appellate Division, Third Department to annul a Tier III hearing determination and send it back for a new hearing. Matter of Cooks v. Prack, 929 N.Y.S.2d 502 (3d Dep't 2011). The decision was prompted by the inmate's pro se Article 78 petition for review of the hearing.

After a sharpened piece of plexiglass turned up in a frisk of his cell, John Cooks received a misbehavior report charging possession of a weapon. At his Tier III hearing, Mr. Cooks requested a copy of Directive No. 4910, which the hearing officer denied. The directive, entitled "Control of & Search for Contraband," includes a section on placement of a general confinement inmate during an unscheduled frisk of his cell. It reads, in part: "If the inmate is removed from quarters prior to the search, he or she shall be placed outside the immediate area to be searched, but allowed to observe the search."

The Third Department noted that the hearing record in this case indicated that the inmate may have been removed from the immediate area and not allowed to observe the search. Therefore the directive could have been relevant to forming his defense, and its denial required annulment. Because the court found that the hearing determination was otherwise supported by substantial evidence, it remitted the case to the Commissioner of Corrections for a new hearing.

## **H.O.'s Personal Interview of Witness Who Refused to Testify Leads to Dismissal of Article 78 Petition**

In Matter of Jackson v. Fischer, 928 N.Y.S.2d 613 (3d Dep't 2011), the petitioner challenged a Tier III hearing determination finding him guilty of being out of place, making threats, refusing a direct order, engaging in forcible touching, lying and stalking. He asked that the court reverse the hearing based on the hearing officer's denial of his right to call witnesses. During the hearing, the petitioner

asked that four witnesses be called. Only one of the four agreed to testify. However, that witness ultimately signed a statement saying that he refused to testify because he did not want to do so. The hearing officer personally interviewed this witness and confirmed that he had changed his mind about testifying. Under these circumstances, the court held, citing Matter of Hill v. Fischer, 917 N.Y.S.2d 714 (3d Dep't 2010), the petitioner's right to call witnesses was not violated.

## **Parole**

### **Untimely Preliminary Hearing Causes Court to Grant Habeas Petition**

Executive Law §259-i(3)(c)(i) requires that preliminary hearings in parole revocation proceedings be held within fifteen days of execution of the warrant for re-taking. In People ex rel. Blasco v. New York State Division of Parole, 260338-11 (Sup.Ct. Bronx Co. Sept. 7, 2011) (Price, J.), the court considered under what circumstances a hearing officer may lawfully adjourn a preliminary parole revocation hearing and thereby cause it to exceed the statutory period within which a preliminary hearing must take place.

The facts before the court were these. On February 18, Petitioner Blasco was served with a Notice of Violation of Release Report and a copy of the Violation of Release report. Petitioner elected to have a preliminary hearing, which was scheduled for February 28, a date within the fifteen day period following the execution of the re-taking warrant. At the preliminary hearing, a parole officer with no firsthand knowledge of the parole violation testified. During closing arguments, the hearing officer communicated to the parole officer that because only hearsay evidence was offered, the evidence that a violation had occurred was insufficient. At that point, the parole officer asked that the hearing be adjourned so that the parole officer with firsthand knowledge could testify. The parole officer did not provide an explanation as to why the officer with firsthand knowledge of the violation had not come to the hearing on February 28. The hearing officer granted

the motion. The hearing was re-convened on March 4, 3 days after the close of the 15 day period within which a preliminary hearing must be held. At the March 4 hearing, the hearing officers agreed that the re-convened hearing was a new hearing and was not a continuation of the hearing that began on February 28. The parole officer with firsthand knowledge testified and the hearing officer found probable cause to believe that petitioner had violated parole.

Petitioner then filed a habeas action alleging that the Division of Parole had no authority to hold him because it had not conducted a timely preliminary hearing. Petitioner also argued that the adjournment was improper because the Division of Parole had not stated a reason for the absence from the hearing of the parole officer with firsthand knowledge of the alleged parole violation.

In reviewing petitioner's claim that he was not afforded a preliminary hearing within the statutory fifteen day period, the court first found that Executive Law §§259-i(3)(c)(i) and 259-i(3)(c)(iv) require that a preliminary hearing be scheduled within fifteen days of the execution of the warrant.

### **No Legitimate Reason For Adjournment**

The court questioned whether the Division of Parole was required to provide a legitimate reason for an adjournment that took the hearing outside of the fifteen day period within which the law requires that it be held. The law provides for adjournments, and says nothing about their timing or the reasons for them. Nonetheless, the court noted, caselaw requires that the Board of Parole provide a legitimate reason for requesting an adjournment. See, People ex rel. Burley v. Warden, 415 N.Y.S.2d 871 (1<sup>st</sup> Dep't 1979) (permitting an adjournment where the alleged violator is unavailable due to illness and has not waived his right to attend); People ex rel. Goldberg v. Rikers Island, 846 N.Y.S.2d 15 (1<sup>st</sup> Dep't 2007) (same); People ex rel. Hampton v. Rikers Island, 621 N.Y.S.2d 580 (1<sup>st</sup> Dep't 1995) (permitting adjournment where snowstorm interfered with operation of prison). An absence of explanation was also dispositive. See, People ex rel. McGee v. Walters, 405 N.Y.S.2d 538 (1<sup>st</sup> Dep't 1995) (adjournment improper where parole officer who prepared the violation report was

not present at the hearing and no finding was made that he was unavailable to testify).

In Blasco, the court found that as with the hearing at issue in McGee, the Division of Parole had without explanation failed to produce the officer with firsthand knowledge of the parolee's alleged violation and then asked for an adjournment. Since the Division's burden of proof at a preliminary hearing cannot be met with exclusively hearsay testimony, in both cases the absence of these witnesses meant that the Division could not prove its case. Notwithstanding that the presence of these witnesses was essential to the Division's case in both Blasco and McGee, the Division failed to account for their absence, and the hearing officers nonetheless granted adjournments. Here, the court wrote, as in McGee, it cannot be concluded that the adjournment was supported by a legitimate reason.

While the court agreed with the petitioner's analysis, it nonetheless found that by failing to object to the adjournment, petitioner had waived his claim that the adjournment was improper.

### **De Novo Hearing**

The petitioner also argued that because the respondent both **denominated** (called) the adjourned hearing a de novo hearing and actually held a new hearing – that is, they did not rely on any of the testimony or evidence produced at the hearing held on February 28 – the hearing was not held within 15 days and was untimely. The court agreed with this argument. It noted that there was no evidence to support an argument that the hearing was a continuance of the hearing that began on February 28. The hearing officer stated that he was starting the case over again. “Stripped of its substance,” the court wrote, “the February 28, 2011 hearing, while held within fifteen days of the execution of the warrant, became a mere shell – a procedural placeholder.” Because the only materially relevant hearing occurred on March 4, 2011, eighteen days after the warrant was executed, the court held, the inescapable conclusion was that the Division did not timely conduct petitioner's preliminary parole revocation hearing.

In reaching this result, the court reasoned that allowing the Division an adjournment after it becomes clear that it does not have sufficient

evidence to meet its burden preserves the Division's ability to indefinitely hold an alleged violator in custody for as long as it needs to build its case. This interpretation of the law, the court wrote, clearly frustrates the purpose of the fifteen day requirement, the purpose of which is to ensure a speedy hearing so that the parolee is not imprisoned for an undue length of time.

Finding that under this analysis the Division had failed to hold a hearing within fifteen days, the court sustained the petition and vacated the warrant.

## Miscellaneous

### Inmate Medical Records Accessible Under FOIL, Not Just Public Health Law

In the Matter of Legal Aid Society v. New York State Department of Correctional Services, et al., 930 N.Y.S.2d 887 (2d Dep't 2011), the Appellate Division, Second Department ruled that prison medical records are accessible under the state Freedom of Information Law (FOIL), and DOCCS may not charge more than 25 cents per page if the records were requested pursuant to FOIL by the patient or with the patient's consent.

The dispute arose when DOCS (as the department was then known) decided to disclose certain inmate medical records under Public Health Law §18 at 50 cents per page, rather than under FOIL at 25 cents per page, as the Legal Aid Society (Legal Aid) had requested. Legal Aid filed an Article 78 proceeding in Supreme Court, Dutchess County to compel the disclosure of inmate medical records under FOIL at 25 cents per page. The Dutchess court sided with Legal Aid, as did the Second Department on appeal. The Second Department opinion, citing Matter of Mantica v. New York State Dept. of Health, 94 N.Y.2d 58, 61 (1999), states: "FOIL imposes a broad standard of open disclosure upon agencies of the government, [and] [d]ocuments in the possession of public agencies are presumptively discoverable under FOIL." The fact that an individual could obtain his records pursuant to Section 18 of the Public Health Law, the appellate court held, does not diminish his right to obtain them under FOIL.

The decision is binding only on requests for state prison medical records and only on DOCCS facilities within the Second Department (the counties of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam).

As the opinion notes, the Third Department reached a different conclusion in Matter of Pratt v. Goord, 199 N.Y.S.2d 611 (3d Dep't 2005). In that case, the Third Department agreed with DOCCS's position that Public Health Law §18 governs how an inmate may access his medical records and

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rejected the inmate's claim that he could access them under FOIL.

There is a similar case on appeal in the Fourth Department after it was decided in Legal Aid's favor in Erie County (Legal Aid Society v. New York State Department of Correctional Services and Paula Rock, Index No. 297/2011, Supreme Ct., Erie Co., April 14, 2011). There is no precedent in the First Department.

DOCCS has not submitted a motion for leave to appeal in the case out of the Second Department.

### **Poor Person Status Denied for Name Change Application**

According to an opinion by the Supreme Court, Dutchess County, because a judicially ordered name change is not a fundamental constitutional right, it is within the court's discretion to grant or deny an indigent inmate's application for poor person's status in connection with a name change petition. Matter of Furick, 930 N.Y.S.2d 407 (Sup. Ct. Dutchess County 2011).

At the outset, the court noted that adult name change applications are usually not controversial. However, petitions from convicted felons serving their sentences do get more scrutiny from courts. When corrections officials or district attorneys object to such changes, claiming that they would cause record-keeping problems and potentially endanger crime victims and the general public, courts may defer to the officials.

Before looking at the merits of the inmate's petition, the Dutchess court had to decide whether he was entitled to poor person status, pursuant to C.P.L.R. §1101, which would waive the filing fee. Citing the landmark U.S. Supreme Court case of Boddie v. Connecticut, 401 U.S. 3171 (1971), the court noted that procedural due process dictates that certain fundamental rights, such as the right to marry and divorce, cannot be denied to those who are too poor to pay court fees, whether or not they are incarcerated.

On the other hand, when a fundamental right is not involved, the U.S. Supreme Court has held that access to the courts may be denied if there is a rational basis for it. Comparing this case to a case in which the U.S. Supreme court required payment

of the filing fee for a bankruptcy petition, the Dutchess court stated that a judicial name change – particularly where there is a non-judicial process for accomplishing the same end – is significantly less basic or urgent to an indigent person than a discharge of debts in bankruptcy. Thus the court concluded that the taxpayers of the State of New York are not required to pay for a person's judicial name change. Having decided to deny the inmate's application for poor person status, the court did not rule on the merits of the name change petition itself.

### **Court Dismisses Article 78 Seeking Order to Compel Prosecution of Guard**

A correction officer brought criminal charges against Johnathan Johnson alleging that Mr. Johnson had thrown urine on him. After the officer testified at the grand jury, Mr. Johnson was indicted for aggravated harassment of an employee. Ultimately, the Franklin County District Attorney declined to continue the prosecution. At this point, Mr. Johnson requested that the District Attorney file charges against the officer for having filed a false report, and asked the Inspector General and the DOCCS Commissioner to take appropriate action against the officer. When these officials failed to take action, Mr. Johnson filed an Article 78 action asking the court to order respondent to arrest and prosecute several correction officers for filing false police reports and falsifying business records and reports. The respondent DOCCS Commissioner, DOCCS Inspector General, District Attorney and State Police Superintendent moved to dismiss the action for failure to state a claim.

In Matter of Johnson v. Corbitt, 929 N.Y.S.2d 783 (3d Dep't 2011), the Appellate Division affirmed the Supreme Court's dismissal of the action. In doing so, the court wrote that state officials can only be compelled to take actions which are mandatory, and then only when there is a clear legal right to the relief sought. Inasmuch as the decision whether to prosecute a particular suspect is entrusted to the unfettered discretion of the District Attorney, "mandamus will not lie."

## Court Upholds Denial of Limited Time Credit Allowance

In 2008, the legislature amended the Correction Law to add section 803-b, authorizing DOCCS to issue limited credit time allowances to inmates who meet certain criteria, including having participated as an “inmate program associate” (IPA) for a period of two or more years. In Matter of Abreu v. Fischer, 930 NYS2d 289 (3d Dep’t 2011), the court addressed the claim of the petitioner, who having served as a law library clerk since 2007, in 2009 filed a grievance asking that he be found eligible to receive a time allowance for that service. When the grievance was denied and the denial upheld by the Central Office Review Committee, the petitioner filed an Article 78 petition. The Appellate Division upheld the Supreme Court’s dismissal of the petition, holding that judicial review of the denial of an inmate grievance is limited to assessing whether the determination is arbitrary and capricious or affected by error of law. In this case, the petitioner argued that when DOCS revised the IPA policy and procedures in 2009, it arbitrarily excluded petitioner’s assigned program from the IPA list.

The court found that there was no evidence in the record to show that even prior to the 2009 revision of the IPA policy, law library clerks were considered IPAs. Prior to the revision of the policy, the position of law library clerk was listed as a *possible* IPA assignment. Further, the departmental guidelines do not specify that an inmate needs to be trained as an IPA in order to serve as a law library clerk. And, the court found, although the petitioner began serving as a law library clerk in May 2007, he did not complete his IPA training until July 2009. Thus, the court held, it cannot be said that the Central Office Review Committee acted irrationally in denying the petitioner’s grievance.

## Federal Court Decisions

### Challenge to Son of Sam Law Fails

In Vincent v. Sitnewski, 2011 WL 4552386 (SDNY Sept. 30, 2011), the plaintiff sued eight prison guards alleging that they had violated his 8<sup>th</sup> Amendment rights by assaulting him and sought a declaratory judgment finding that the New York State Son of Sam Law, Executive Law §632-a, was unconstitutional because it is pre-empted by 42 U.S.C. §1983. Executive law §632-a (EL §632-a) seeks to facilitate crime victims’ civil recovery of compensatory damages from convicted persons who harmed them by providing victims, among other things, with an extended limitations period within which to commence civil lawsuits against such convicted persons. The defendants moved to dismiss the claim that the Son of Sam Law (EL §632-a) is pre-empted by §1983, because, among other reasons, the claim failed to state a claim on which relief can be granted.

The plaintiff’s claim is premised on the doctrine that an Act of Congress can **pre-empt** (override, supercede ) a state law by 1) express pre-emption, 2) implied pre-emption, or 3) pre-emption based on an actual conflict between the state law and a federal statute. Conflict pre-emption occurs where compliance with both the federal and state laws is a “physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Supreme Court has advised that courts “should not lightly infer pre-emption.” International Paper Co. v. Ouellette, 479 U.S. 481, 482 (1987).

Easily determining that there was no express or implied pre-emption between §1983 and EL §632-a, the court turned to the question of whether EL §632-a is in conflict with §1983. The plaintiff argued that the state law extending the statute of limitations for crime victims seeking damages from the criminal defendants who harmed them in the course

of their crimes was pre-empted by §1983 because allowing the crimes victim to recover their damages from a §1983 award is inconsistent with the goals of §1983 and would discourage the state's employees from complying with federal and constitutional rights of prisoners. The Eighth Circuit Court of Appeals used this reasoning to invalidate a state law permitting the state of Missouri to recover the costs of incarceration from an inmate's §1983 award. See, Hankins v. Finnel, 964 F.3d 853 (8<sup>th</sup> Cir. 1992).

The court in Vincent rejected this reasoning, noting that although the 8<sup>th</sup> Circuit had invalidated the Missouri statute permitting the recovery of the costs of incarceration from §1983 awards, in a subsequent case, the 8<sup>th</sup> Circuit declined to extend the pre-emption doctrine to an Iowa state statute authorizing the seizure of prisoners' §1983 recoveries to pay restitution to the victims of their crimes. See, Beeks v. Hundley, 34 F.3d 658 (8<sup>th</sup> Cir. 1994). The court in Beeks found that the Iowa statute did not significantly affect the central purpose of §1983 – compensating victims of constitutional violations – because from a financial standpoint, the inmates received virtually all the benefit of the §1983 money judgment when the proceeds were applied to satisfy their restitution debts. In addition, the court wrote, the restitution statute did not subvert §1983's goal of deterring state employees from violating the constitutional rights of inmates because the money was applied to the inmate's pre-existing obligations to the victims of their crimes.

The Vincent court found that the Iowa statute and New York's Son of Sam Law were similar in effect and purpose, but employed different mechanisms to reach their results. The restitution provision in the Iowa statute is triggered by the fact of the conviction while the New York statute merely facilitates subsequent actions for damages brought by the victims of certain crimes.

In contrasting the purposes of EL §632-a and Section 1983, the Vincent court noted that the Son of Sam Law recognizes that a crime victim may have a valid cause of action against a perpetrator of a crime and sets forth procedures to assist in locating funds which might be recovered from the perpetrator and procedures to facilitate litigation of the victim's cause of action. Section 1983, on the other hand, deals with another kind of cause of

action that enables victims of constitutional violations to recover damages from governmental officers perpetrating such violations. Causes of action against perpetrators and causes of actions under §1983, the court concluded, are both of value to our society, and there is no basis for holding that EL §632-a, which facilitates crime victims' lawsuits against the offenders who harmed them, is in conflict with §1983 or interferes with carrying out the purpose of that statute. Based on this reasoning, the court dismissed the plaintiff's claim that EL §632-a is pre-empted by §1983.

### **Misdiagnosis Not Enough for Deliberate Indifference Claim in Civil Rights Case**

Failure to diagnose fractures, which led to chronic wrist pain and a permanently bent finger, may have been medical malpractice, but it was not deliberate indifference to a serious medical need that would support an inmate's claim of cruel and unusual punishment, a federal court ruled in Beaman v. Unger, et al., 2011 WL 4829417 (W.D.N.Y. Oct. 12, 2011).

The case arose after an inmate slipped and fell on an icy walkway on his way to the mess hall. Immediately after his fall, a nurse examined him, gave him ibuprofen, and said he would heal. The next day, another nurse gave him more ibuprofen and told him to "ride out the pain." After six weeks of severe pain, he was examined by a facility doctor, who scheduled an x-ray. When the inmate went back for the results, the doctor told him that nothing was fractured. But about a week later he was sent to see a specialist, who told him that the x-rays showed fractures in his wrist and finger. Surgery was required to correct the wrist injury, but nothing could be done about the finger, which remained permanently bent. The wrist surgery was generally successful, but the inmate continued to have chronic pain.

After exhausting the DOCCS grievance procedures, the inmate filed a federal civil rights action under 42 U.S.C. §1983 alleging that the nurses, the doctor, and the superintendent of Wyoming Correctional Facility violated his Eighth Amendment right to be free of cruel and unusual punishment.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), the U.S. Supreme Court established that, to show that prison medical treatment was so inadequate as to amount to cruel or unusual punishment, an inmate must prove that the staff's actions — or failure to act — amounted to deliberate indifference to a serious medical need. Later cases established that a medical need is serious if it presents a condition of urgency that may result in degeneration or extreme pain. As for what makes “deliberate indifference,” the Supreme Court identified two factors: whether there has been a sufficiently serious deprivation of the prisoner's constitutional rights, and whether this was caused by the defendants in wanton disregard of those rights. The *Estelle* decision also warned that negligence alone is not a sufficient basis for a federal civil rights claim; rather, an inmate must allege conduct that is repugnant to the conscience of humankind or incompatible with the evolving standards of decency that mark the progress of a maturing society.

Accepting the inmate's allegations as true (which a court is required to do for the limited purpose of deciding a motion to dismiss the complaint), here the court found that the inmate had alleged facts showing that he suffered from a serious medical need. But the court also found that he had failed to allege facts showing that the staff was deliberately indifferent to his serious medical need. The most his allegations showed, the court stated, was that the two nurses and the facility doctor misdiagnosed his injuries and failed to recognize the severity of those injuries. This is not enough to state an Eighth Amendment claim of cruel and unusual punishment. The inmate's complaint was therefore dismissed for failure to state a claim upon which relief can be granted.

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